

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CHARTER TOWNSHIP OF SHELBY, a
Michigan Municipal Corporation,

Plaintiff,

vs.

Case No. 2013-5046-CZ

ARGONAUT INSURANCE COMPANY, a
foreign corporation,

Defendant.

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). Defendant has filed a response requesting that Plaintiff's motion be denied.

Facts and Procedural History

This matter arises out of a liability policy LE 4618669-00 that was issued by Defendant to Plaintiff (the "Policy"). The Policy has an effective date of July 1, 2009 to July 1, 2010. The Policy covers claims for, *inter alia*, "wrongful act[s] by the employees of the Shelby Township Police Department which occurred during "law enforcement activities." Specifically, pursuant to the Policy Defendant agreed to "pay those sums that [Plaintiff] becomes legally obligated to pay as damages resulting from a wrongful act to which this insurance applies that is committed during the course and scope of 'law enforcement activities... [Defendant] will have the right and duty to defend [Plaintiff] against any 'suit' seeking those 'damages'[The Policy] applies to 'damages' arising out of a "wrongful act" committed anywhere in the world. These obligations

extend to “any employee or authorized volunteer of the named insured” including “the conduct of any multi-jurisdictional law enforcement organization.” (*See* Plaintiff’s Exhibit W.)

On or about July 28, 2011, a civil lawsuit was commenced in the United States District Court, Eastern District of Michigan, Case No. 1:11-cv-13318-AC-MJH by James Baum and Anthony Pellegrino against Detective Jeffrey Walsh, Sergeant Schmittler and Detective Jacquemain (collectively, the “Lawsuit Defendants”) for, *inter alia*: (1) unlawful detention and use of excessive force in violation of 42 USC §1983; (2) assault and battery; and (3) false arrest/false imprisonment. (The July 28, 2011 federal lawsuit is hereby referred to as the “Lawsuit”.)

Plaintiff submitted a claim related to the Lawsuit to Defendant for coverage under the Policy (“Claim”). The Claim was denied by Defendant. Plaintiff then defended the Lawsuit, which ultimately resulted in a settlement. After the Lawsuit was settled Plaintiff sought reimbursement from Defendant for the costs it had incurred in defending the Lawsuit. That request was also denied.

On December 23, 2013, Plaintiff filed its complaint in this matter, which included the following claims: Count I- Breach of Contract for Declaratory Relief and Damages; Count II- Violation of the Michigan Uniform Trade Practices Act (MUPTA), MCL 500.2006; and Count III- Declaratory Judgment. On February 13, 2014, Count II was voluntarily dismissed.

On July 29, 2014, Plaintiff filed its instant motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). Defendant has since filed a response and requests that the motion be denied and that summary disposition be entered in its favor. Plaintiff has also filed a reply in support of its position. On September 25, 2014, the Court held a hearing in connection with the motion and took the matter under advisement.

Standards of Review

A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority*, 253 Mich App 144, 161; 658 NW2d 804 (2002).

Arguments and Analysis

In its response, Defendant contends that it did not have a duty to defend the Lawsuit, and does not have duty to reimburse Plaintiff for the costs its incurred in connection with the Lawsuit, because the allegations contained in the complaint filed in connection with the Lawsuit alleged that the Lawsuit Defendants engaged in acts that fall outside the applicable policy provisions and within the applicable policy exclusion.

The Policy provides, in pertinent parts:

A. Insuring Agreement

[Defendant] will pay those sums that the [Plaintiff] becomes legally obligated to pay as “damages” resulting from a “wrongful act” to which this insurance applies that is committed during the course and scope of “law enforcement activities”, or which arise out [Plaintiff’s] ownership, maintenance or use of premises for the purpose of conducting “law enforcement activities.”

[Defendant] will have the right and duty to defend [Plaintiff] against any “suit” seeking those “damages”. However, [Defendant] will have no duty to defend the insured against any “suit” seeking “damages” for a “wrongful act” to which this insurance does not apply. [Defendant] may, [in its] discretion, investigate any “wrongful act” and settle any claim or “suit” that may result.”

However:

- a. The amount [Defendant] will pay for “damages” is limited as described in LIMITS OF INSURANCE AND DEDUCTIBLE (Section III); and
- b. [Defendant’s] right and duty to defend end when [it has] used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments (Section i.C.)

This insurance applies to “damages” arising out of a “wrongful act” only if the “wrongful act” was first committed:

- a. By an insured in the course of his or her “law enforcement activities” and
- b. During the policy period.

This insurance applies to “damages” arising out of a “wrongful act” committed anywhere in the world.

B. Exclusions

This insurance does not apply to:

2. Any claim arising out of:

- a. a dishonest, malicious, fraudulent or criminal act, error or omission by any person, including actual or threatened acts of sexual abuse or molestation, or:

- b. a knowing violation of any law, statute or governmental regulation.

This exclusion applies only to the insured(s) who committed or had knowledge of the fraudulent, criminal or dishonest act, error, omission or violation of law. However if it is later established by a judgment or other final adjudication that the allegation was not proven, we will reimburse the insured for the reasonable costs of defense.

SECTION II- WHO IS AN INSURED

[Plaintiff] is an insured, and

Each of the following is an insured buy only for acts that were both within the scope of his or her duties for [Plaintiff], and motivated, at least in part, by a purpose to serve [Plaintiff]:

1. Any member of the governing body of the [Plaintiff].
2. Any boards, commissions and councils of [Plaintiff] and [its] members.
3. Any elected or appointed official of [Plaintiff].
4. Any “employee” or authorized volunteer of [Plaintiff].
5. Any “employee” of [Plaintiff] with respect to the conduct of any multi-jurisdictional law enforcement organization.

SECTION V- DEFINITIONS

6. “Law Enforcement Activity(ies)” means administration of the criminal justice system and/or any act, error or omission of your law enforcement agency, its officials officers, “employees” or volunteers. “Law Enforcement Activity” also includes the use, operation or maintenance of any premises by your law enforcement agency.
11. “Wrongful Act” means any act, error or omission flowing from or originating out of a “law enforcement activity”. All acts, errors or omissions, committed by one or more insureds that are substantially the same or are in any way directly or indirectly related - either logically, causally, or temporally – shall be deemed to constitute one “wrongful act”, regardless of the number of claims or claimants.

When interpreting an insurance contract, the Court applies the same contract construction principles that govern any other type of contract. *Royal Prop Group, LLC v Prime Ins Syndicate*,

Inc., 267 Mich App 708, 714; 706 NW2d 426 (2005). “The primary goal in the construction or interpretation of a contract is to honor the intent of the parties.” *Id.* (quotation marks and citations omitted). And the best way to determine the parties' intent is to examine the language of the contract. *Id.* Accordingly, an insurance contract should be read as a whole and meaning should be given to all terms. The policy application, declarations page of the policy, and the policy itself construed together constitute the contract. The contractual language is to be given its ordinary and plain meaning. An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. [*Id.* at 715.]

The Michigan Court of Appeals, in a case similar to this matter, addressed the scope an insurer's duty to defend in *Wilcox v Munger*, unpublished per curiam opinion of the Court of Appeals, decided December 20, 2007, (Docket No. 275329). In *Wilcox*, several police officers responded to a report of slashed tires. After the officers arrived at the scene one of the officers allegedly sexually assaulted the plaintiff. The plaintiff subsequently filed a civil rights lawsuit under 42 USC § 1983 against the officer's estate. While the officer was covered by an insurance policy provided by defendant the defendant denied coverage. The plaintiff then filed a lawsuit seeking a declaration that the officer was covered by the policy. The trial court subsequently entered summary disposition in favor of the defendant. While it was undisputed that the officer arrived at the scene within the scope of his official duties, the defendant on appeal argued that summary disposition was appropriate because the officer was acting outside of the scope of his employment when he committed the sexual assault. In reversing the trial court's decision, the Court of Appeals held:

The problem this Court sees with [defendant's] rationale finds its basis in the very language of the coverage documents. On the one hand, the documents purport to

provide coverage for claims against an employee seeking damages for personal injury (including constitutional and civil rights violations) or wrongful acts so long as the employee is acting within the scope of his employment duties. On the other hand, defendant encourages a reading of the coverage documents that would exclude coverage *because* [the officer's] actions could be categorized as causing personal injury (or a wrongful act). Per the coverage documents, Heika is afforded coverage for the claim of sexual assault (wrongful act) committed while he was acting within the scope of his employment, yet by virtue of committing the personal injury (or wrongful act) action, is deemed to have not been acting within the scope of his employment. This language is ambiguous, indeed circular, and leaves this Court to ponder when causing personal injury or committing a wrongful act would be part of one's employment duties or fall within the scope of one's employment such that he would be afforded coverage for claims alleging a wrongful act.

Id. at 3.

After finding the contract's terms ambiguous, the Court of Appeals noted that there was no extrinsic evidence available to help determine the parties' intent. Consequently, the Court resolved the ambiguity against the drafting party, i.e. defendant, under the rule of *pro con proferentem*. *Id.* As a result, the Court held that defendant was required to defend the lawsuit. *Id.*

In this case, as in *Wilcox*, the Policy provides that it covers wrongful acts committed by a police officer committed by the officer in the course of his/her "law enforcement activities". However, Defendant would, as the defendant in *Wilcox* did, argue that any wrongful act was outside of the officer's law enforcement activities, and therefore not covered. As the Court of Appeals held in *Wilcox*, this Court is convinced that the language of the Policy is ambiguous and circular. Further, as in *Wilcox*, the Court is satisfied that the Policy must be construed against the drafting party, i.e. Defendant. Consequently, the Court is convinced that summary disposition must be granted in favor of Plaintiff on the grounds that Defendant had a duty to defend the Lawsuit.

Conclusion

For the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and CLOSES the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: October 14, 2014

JCF/sr

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